IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 987 of 1997

with

CRIMINAL APPEAL No 1029 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE D.K.TRIVEDI
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

RAMANBHAI BEHCARBHAI RAMI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 987 of 1997
   MR DEEPAK M SHAH for Appellant No. 1
   MR BY MANKAD APP for Respondent No. 1
2. Criminal Appeal No. 1029 of 1997
   MR DEEPAK M SHAH for Appellant No. 1
   MR BY MANKAD APP for Respondent No. 1

CORAM : MR.JUSTICE D.K.TRIVEDI
and
MR.JUSTICE H.H.MEHTA

Date of decision: 01/08/2002

CAV COMMON JUDGEMENT

(Per : MR.JUSTICE H.H.MEHTA)

#. As these two appeals are arising from one common judgement dated 11.9.1997 rendered by Additional Sessions Judge, Nadiad in Special NDPS Case No. 9 of 1996, same are disposed of by this Common Judgement. Criminal Appeal No. 987 of 1997 is filed by original accused No. 2 Ramanbhai Becharbhai Rami, while Criminal Appeal No. 1029 of 1997 is filed by original accused No. 1 Prabhat Mahiji Gohil.

#. Original accused No. 1 of Special NDPS case has by filing Criminal Appeal No. 1029/97 challenged the correctness and legality of judgement of conviction and sentence dated 11th September, 1997 rendered by learned Additional Sessions Judge, Nadiad, whereby, he has been convicted under Section 235 (2) of the Criminal Procedure Code (hereinafter referred to as "Cr.P.C." for short) for the offences punishable under Section 17, 18, 20 (b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the NDPS Act" for short) and is sentenced to undergo imprisonment for said three offences for 10 years and to pay a fine of Rs.1 lac and in default of fine, to undergo further imprisonment for one year. He is also convicted for the offence punishable under Section 27 of the NDPS Act and is sentenced to undergo further imprisonment for one year and to pay a fine of Rs.500/- and in default, of fine to undergo further imprisonment for 7 days.

2.1 Though charge was framed against accused No. 1 for an offence punishable under Section 21 of the N.D.P.S. Act, no order appears to have been passed for that offence qua accused no. 1. State has not preferred any acquittal appeal against accused No. 1 for "no order" passed for an offence punishable under Section 21 of the N.D.P.S. Act.

2.2 Accused No. 2 of aforesaid case has challenged that very judgment, by which, he has been convicted under Section 235 (2) of the Cr.P.C. for an offence punishable under Section 21 of the NDPS Act and is sentenced to undergo imprisonment for 10 years and to pay a fine of

Rs.1 lac and in default of fine to undergo imprisonment for one year.

2.3 Though the accused No. 2 was charged to face the trial for the offences punishable under Sections 17, 18, 20 (B) and 27 of the NDPS Act, the learned Judge of the Trial Court has acquitted him of the said offences. It may be noted that the State Government has not preferred any acquittal appeal against accused No. 2 for his acquittal from the charge of offences punishable under Sections 17, 18, 20 (B) and 27 of the NDPS Act.

#. The facts leading to these present two appeals in a nutshell are as follows :-

3.1 As per the case stated in the complaint of Shri Kishorbhai Bahadursinh Jadeja on or about 23rd June, 1996, he was performing his duties as Police Sub-Inspector in Anand Rural Police Station. He received a secret information from his informant that one Prabhatbhai Mahijibhai Gohil (accused No. 1) was carrying on the business of "Ganja" and "Charas" in village Napad. He made an arrangement to call two independent witnesses, who can work as panch witnesses. Panch witnesses came in the police station. They were informed about the raid to be carried out at village Napad. For this purpose, one preliminary panchnama was drawn during the period from 17.25 to 17.35 hours.

3.2 Thereafter said Kishorsinh, in company of Head Police Constables Udesinh and Sattarmiya and Police Constable Balvantsinh, left Anand Rural Police Station for Napad by a Government Vehicle. When they reached near Bhathiji Temple in village Napad, on seeing them two persons started to run away from the place. The police persons immediately caught hold of them. They were asked to state their names and addresses. One of them stated his name to be Prabhatbhai Mangabhai resident of village Napad - Vanta (who is appellant of Criminal Appeal No. 1029/97). Second person stated his name to be Ramanbhai Becharbhai, resident of village Napad (appellant of Criminal Appeal No. 987/97). Said Kishorsinh Jadeja suspected that said two persons were having some contraband articles prohibited under the NDPS Act and therefore, he apprehended them. He asked these two accused as to whether they wanted to be searched in his presence or they wanted to be searched in presence of some superior officer. Thereupon, the accused informed the complainant that they wanted to be searched in presence of other superior officer. Complainant drew a panchnama for the events transpired upto this stage in

presence of two panch witnesses, at 18.15 hours.

3.3 Thereafter, the complainant made a phone to his superior officer Shri Ramjibhai Darpanbhai Chaudhari, who at relevant point of time, was performing his duties as Circle Police Inspector, Anand. On receiving information, Shri Chaudhari arrived at the place where accused were kept standing by the complainant. Shri Chaudhari informed that two accused that he wanted to search them and asked them as to whether they have any objection for such search. Accused replied that they had no objection. Thereafter, Shri Chaudhari in presence of two panch witnesses, searched both the accused one by one. On search being made of a 'person' of accused No. 1- Prabhatbhai, three small packets of plastic were found from the pocket of "Zabhbha". On smelling that article of three small packets, it was found that it was an opium. From another pocket of "Zabhbha" of accused No. 1, currency notes of Rs.150/-were found.

3.4 Then personal search of accused No. 2 Ramanbhai Bechar was made. On search being made 28 small balls wrapped in white paper were found from the pocket of trouser worn by accused No. 2. On seeing that small balls, it was found that small balls were of "Charas". From the pocket of Shirt, currency notes of Rs.400/were found from accused No. 2.

3.5 Thereafter, house of accused No. 1 was searched in presence of panch witnesses. On search being made, seven small packets of "Ganja" and 29 small packets of "Ganja-Powder" were found from the house of accused No. 1. On weighing that articles, it was found that 7 small packets of "Ganja" were weighing in all 70 grams, while 29 small bags of 'Ganja Powder" were found totally weighing 60 grams. 3 small packets of opium weighing 30 grams were found from the house of the accused No. 1. One scale and weight measure of 50 grams were also found from the house of the accused No. 1.

3.6 As per the prosecution case, weight of 28 small balls of "Charas" was 14 grams. Complainant seized all these muddamal articles under panchnama. Representative samples of each article were prepared, properly packed and duly sealed in presence of panch witnesses. For this work, the complainant had drawn a panchnama on the spot. That panchnama came to be completed at 20 hours. Thereafter, complainant prepared his complaint against both the accused. Thereafter, the complainant lodged his complaint in Anand Rural Police Station at 22.05 hours. That complaint came to be registered as CR. No. Proh.

341 of 1996. The complainant handed over all the muddamal articles seized from the accused. He also handed over the custody of both the accused to the PSO of Anand Rural Police Station. Thereafter, PSO of Anand Rural Police Station, entrusted the investigation of the case to Shri R.B. Chaudhari. He recorded police statements of witnesses, who were conversant with the facts of the case. The representative samples of muddamal articles were sent to Forensic Science Laboratory ("F.S.L." for short). On receipt of report of FSL, the investigating agency filed chargesheet against both the accused on or before 14.6.1996. That chargesheet came to be registered as Special NDPS Act No. 9 of 1996.

3.7 Learned Additional Sessions Judge, Nadiad, framed a charge at Ex.3 against both the accused on 18.6.1997. As per the charge Ex. 3, both the accused are charged for the offences punishable under Sections 17, 18, 20 (B), 21 and 27 of the NDPS Act. On recording plea of both the accused, accused pleaded not guilty to the charge and they claimed to be tried. Therefore, the prosecution examined following five witnesses to prove the case against both the accused.

(i) P.W.-1 Udesibhai Roopchand Bhatiya, Ex.10 (Panch witness No. 1)

(ii) P.W.-2 Kishorsinh Bahadursinh Jadeja, Ex. 12 (complainant)

(iii) P.W.-3 Police Head Constable Udesinh Vadisinh, Ex. 15 (who was worked in the office of Circle Police Inspector, Anand Rural Police Station)

(iv) P.W.-4 Arvindbhai Muljibhai, Ex. 23

(v) P.W.-5 Ramjibhai Darpanbhai Chaudhari, Ex. 24, (Investigating Officer)

The prosecution also produced following documents alongwith other documents in support of their case against accused.

(i) Panchnama Ex. 11
(ii) Complaint Ex. 13
(iii) Original Entry No. 19 made in the Station Diary of Anand Rural Police Station at page No. 61, Ex. 14.
(iv) Report of the FSL, Ex. 26.

#. On recording of evidence of prosecution witnesses, was over, the circumstances, appearing against both the accused were brought to the notice of and explained to accused for which further statements of each accused was recorded below his plea. Both the accused have denied practically the entire case of the prosecution. It is their case that a false case has been lodged against them. Thereafter, after hearing the arguments of the learned advocates for both the parties and on appreciating the evidence led by the prosecution, learned Judge of the Trial Court rendered his judgement Ex.28 on 11.9.1997, whereby, both the accused have been convicted and sentenced as stated earlier.

#. Being aggrieved against and dissatisfied with the said judgement of conviction and sentence, both the accused have preferred their appeals, separately as stated earlier.

#. We have heard Shri D.M. Shah, learned advocate for the Appellants and Mr. B.Y. Mankad, learned APP for the respondent State in detail at length. Shri D.M. Shah, learned advocate for the appellants has taken us through the oral as well as documentary evidence led by the prosecution and also the impugned judgement challenged in these appeals.

#. Shri D.M. Shah, learned advocate for the appellants has taken before us the following three main contentions:-

(i) When the complainant received a secret information from his informant, he, by not taking down that information on paper, contravened the provisions of Section 42 of the NDPS Act.

(ii) The complainant and Shri R.B. Chaudhari both have contravened the provisions of Section 50 of the NDPS Act.

(iii) The case against accused No. 2 is not proved and that accused No. 2 has been wrongly convicted for an offence under Section 21 of the NDPS Act.

#. Shri B.Y. Mankad, learned APP has vehemently argued that the complainant had taken down the information in the station diary and therefore, Section 42 of the NDPS Act has been complied with. He has further argued that accused were given option for being searched in presence of either complainant or superior officer and therefore,

Section 50 of the NDPS Act has been complied with. So far as the conviction of accused No. 2 for an offence punishable under Section 21 of the NDPS Act, is concerned Shri Mankad has advanced no arguments.

#. We have considered the submissions made by learned advocates for both the parties. We have reappreciated the evidence by reading each deposition in between the lines. We have also perused the documentary evidence on the record. As deposed to by complainant Shri Kishorsinh Jadeja when he was on duty as PSI Anand Rural Police Station on 23.6.1996 at about 17.35 hours, he received a secret information from the informant. He reduced that information in writing by making an entry Ex.14 in station diary. As per this entry Ex. 14, he left police station for the purpose of investigation with regard to one CR. No. M. Case 16 of 1996 and when he was on the way, the informant informed him that Prabhatbhai was selling intoxicant substance like Ganja and opium at village Napad, Vanta. As he is a PSI, he is not an empowered officer to carry out the raid under the NDPS Act and therefore, as per Sub-section (2) of Section 42 of the NDPS Act, immediately on receipt of information, he reduced it into writing which is at Ex.14. He was further required to send a copy of said information to his immediate superior officer within 72 hours. In this case, copy of Ex. 14 has not been separately sent by complainant to his superior officer. There is nothing on record to satisfy this court that copy of Ex. 14 was sent to Circle P.I. or the DSP, who are immediate superior officers for the complainant.

##. As per the case of the prosecution, immediately after personal search of each accused was carried out, house of accused No. 1 was searched. As per Section 41 of the NDPS Act, the officer, who wants to search the premises like house, has to obtain a warrant from the Judicial Magistrate empowered by the State Government. Here in this case admittedly, the complainant and Shri R.B. Chaudhari in company of other police officers, raided the house of accused No. 1 situated at village Napad during the period from 18.15 hours to 20.00 hours. As per Section 42 (1) of the NDPS Act, the empowered officer can search the building, conveyance or enclosed place between sunrise and sunset. Here in this case, house of Accused No. 1 was searched after sunset because panchnama Ex.11 clearly shows that panchnama was completed at 20-00 hours. If, there is some urgency or emergency for raid to be carried out in the house after sunset, the empowered officer can do it but for that he has to record grounds to carry out the raid after sunset.

Proviso of Sub-section (1) of Section 42 of the NDPS Act reads as under :-

"Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, may, between sunrise and sunset, -

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry ;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under Chapter IV relating to such drug or substance and

(d) detain and search, and, if he thinks proper, arrest any person who he has reason to believe to have committed any offence punishable under Chapter IV relating to such drug or substance;

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity

for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief. "

##. Here in this case, admittedly, neither the complainant nor Shri Chaudhari prepared a writing showing the grounds for raid to be carried out in the house of accused No. 1, after sunset. Thus, in this case, house of accused No. 1 was raided and searched by complainant and Shri Chaudhari, without obtaining a warrant from the Judicial Magistrate and that too after sunset. Thus, the provisions of Sections 41 and 42 of the NDPS Act are clearly violated by the Investigating Agency.

##. In case of STATE OF PUNJAB VS. BALBIR SINGH, reported in (1994) 3, SCC p. 299, the Hon'ble Supreme Court has considered various provisions of the NDPS Act and after considering Sections 41, 42, 43 and 51 of the NDPS Act, it reached to certain conclusions, which are set out in para 25 of the said decision. Under Section 42 (1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42 (1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief. It has further been held that to this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial. It is further held that under Section 42 (2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42 (1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent, it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

Here in this case, Shri Kishorsinh Jadeja received secret information from his informant. He took down that information by making entry at Ex.14 in station

diary. There is no evidence whatsoever to show that he sent a copy of such information to his immediate superior officer. Here in this case, it is an admitted fact that Kishorsinh Jadeja after receiving secret information, left Anand Rural Police Station for Napad by travelling in a Government Vehicle. As per panchnama Ex.11, they left Anand Rural Police Station at 17.35 hours. As per his evidence, when they reached Napad, they saw two persons running in suspicious condition. That two persons were caught hold of by police persons. They were asked about their names and addresses. Even they were informed that police had a reasonable doubt for any intoxicant substance in their possession and for that, they (police) wanted to search them (accused). For this, second panchnama was drawn at 18.15 hours. Thereafter, Shri R.D. Chaudhari, who was called by making a phone to him, reached to that place and in presence of panch witnesses, search of each accused was made and thereafter, house of accused No. 1 was searched. That panchnama was drawn and completed at 20.00 hours. Thus, it can be said that house was searched any time in between 18.30 hours and 20.00 hours and thus, from the record it can be said that house was searched after sunset. Under these circumstances, search of house of accused No. 1 was made after sunset without warrant and therefore, this is a case in which, there is a clear cut violation of Sections 41 and 42 of the NDPS Act. The provisions of that sections are mandatory and as there was a contravention of said two sections, it affects the prosecution case and vitiates the trial. The learned Judge has lightly and casually dealt with this subject and on this score, the judgement of the trial Court is required to be set aside.

##. Shri D.M. Shah, learned advocate for the appellants has vehemently argued that in this case, before search of "person" of each accused was made by Shri Chaudhari in presence of panch witnesses, Section 50 of the NDPS Act was not complied with by them. From panchnama Ex.11, it appears that immediately after catching hold of two accused by police, Shri Kishorsinh Jadeja asked accused to state their names and addresses. Accused gave their names and addresses, which were taken down by Shri Jadeja in second part of panchnama Ex.11. Thereafter, Shri Jadeja informed accused that police had a reasonable doubt that they had some intoxicant substance and therefore, police wanted to search them. It is further stated in the panchnama that Shri Jadeja informed and asked both the accused as to whether they wanted to give search to him or whether they wanted to be searched in presence of some superior officer. As stated in

panchnama both the accused informed Shri Jadaje in presence of panch witnesses that they wanted to be searched in presence of some superior officer. Shri Jadeja has deposed in his evidence that he apprehended both the accused and he asked them as to whether they would give search to him or whether they wanted to be searched in presence of some other officer. He has further deposed that accused informed him that they wanted to be searched in presence of some higher officer. There is no reference with regard to compliance of Section 50 in the complaint - Ex.12 lodged by Mr. Jadeja. Shri Chaudhari in whose presence search was made has deposed that he informed accused that they (police) had doubt for some drugs with them (accused) and for this he informed both the accused that they were at liberty to search police persons, if they wanted to do so and except this, he had no other talk with the accused. In cross-examination, he has specifically deposed that he did not inform the accused that they had a right to be searched in presence of a Magistrate. By placing reliance upon the aforesaid evidence, Shri Shah has vehemently argued that in this case, provisions of Section 50 are not complied with and therefore, prosecution is vitiated and under the circumstances, accused be acquitted by allowing their respective appeals.

##. Shri Shah has argued that it is a right of accused to be informed of, before carrying out search of his "person" that his "person" can be searched either in presence of Gazetted Officer or a nearby Magistrate. Shri B.Y. Mankad, learned APP for the State has argued that looking to evidence led by the prosecution in no case it can be said that provisions of Section 50 are not complied with. He has further argued that as per panchnama Shri Jadeja had informed and asked both the accused as to whether they wanted to give search to him or they wanted to be searched in presence of some superior officer. He has vehemently argued that giving an option in this manner satisfies the requirement of Section 50 of the Act. He has further argued that it is not necessary to give option for search to be made in presence of a Magistrate. In support of his arguments, he has placed reliance on two decisions (i) RAGHBIR SINGH VS. STATE OF HARYANA, reported in 1996 SCC (Cri.) 266 (ii) SALIMUDDIN @ JUGAN N. ANSARI VS. STATE OF GUJARAT, reported in 1999 (3) XL(3) GLR p.2581.

Shri Mankad, learned APP has argued that in Raghbir Singh (supra), the Apex Court has considered the impact and effect of the word "nearest" and has held that

choice of such an officer would obviously be with the empowered officer or authorised officer acting on prior information and about to search person of the accused. He has argued that case of Raghbir Singh (Supra) was considered by the Division of this Court in case of Salimuddin (Supra) and held that in view of Section 50 of the Act, it would be sufficient compliance if an empowered officer or duly authorised officer informs the accused about his right of being searched in the presence of a Gazetted Officer bearing in mind the fact that a Gazetted officer is the nearest available.

In the case on hand before the Division Bench of this Court, the Police Officer, who searched the accused Salimuddin had given only one option and he asked as to whether he wanted to be searched in presence of a Gazetted Officer. Option was not given for a Magistrate. This Court held that when accused was asked, whether he wanted to be searched in presence of Gazetted Officer not mentioning regarding search before Magistrate, that asking would not result in violation of Section 50. Mr. Mankad has further argued that decision in Raghbirsingh (Supra) still holds good, because, it is not reversed till now. He has further argued that decision of Apex Court in Raghbirsingh (Supra) was given by three judges of the Apex Court. He has further argued that looking to Section 50, it is not necessary for police officer to inform of the accused about his right to be searched in presence of either Gazetted Officer or a Magistrate and therefore, when in this case, accused were given two options for being searched, one in presence of Mr. Jadeja, who informed of the accused about their right and other before some superior officer. Here in this case, search has been carried out by Shri Chaudhari, who is a Circle Police Inspector. It was not asked by Mr. Jadeja as to whether they wanted to be searched by Superior Officer of Police department and as per panchnama accused informed that they wanted to be searched before some superior officer. They did not give a name of superior officer of police department.

Admittedly, in this case, option is not given for a Magistrate. It seems that Shri B.Y. Mankad has not come across a latest decision of Hon'ble Supreme Court rendered in case of STATE OF PUNJAB VS. BALDEV SINGH, reported in (1999) 6 SCC p.172. While interpreting Section 50 of the NDPS Act, the Hon'ble Supreme Court has held in para 32 as follows :-

"We hold that the provisions of Section 50 of the Act implicitly make it imperative and obligatory

and cast a duty of the investigating officer (empowered officer) to ensure that search of the person (suspect) concerned is conducted in the manner prescribed by Section 50, by intimating to the person concerned about the existence of his right, that if he so requires, he shall be searched before a Gazetted officer or a Magistrate and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate would cause prejudice to the accused and render the recovery of the illicit article suspect and vitiate the conviction and sentence of the accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered during a search conducted in violation of the provisions of Section 50 of the Act."

It is needless to state that aforesaid case of State of Punjab Vs. Baldevsingh (Supra) has been decided by 5 Judges of the Apex Court. In case of State of Punjab (Supra), the Apex Court has arrived at certain conclusions which are listed in para 57 of the Judgement as under:-

(i) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under Sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.

(ii) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.

(iii) That a search made by an empowered officer, on prior information without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of

the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.

Here in this case, no option was given to either of the accused for being searched in presence of nearest Magistrate. It may be noted that Mr. Jadeja gave an option for two authorities (i) he himself and (ii) other is superior officer. Shri D.M. Shah, learned advocate for the appellants has argued that Mr. Jadeja informed of accused about their right to be searched in presence of Gazetted officer or Magistrate, possibly accused would have given an option for a Magistrate but as in this case, no such option was ever given, accused could not give option for a Magistrate and therefore, serious prejudice has been caused to both the accused.

The authorities cited by Mr. Mankad are authorities previous to the authority of Raghbir Sinh (Supra), which is admittedly of January, 1996 and case of Salimuddin (Supra) seems to have been decided on 6.9.1999. Case of State of Punjab (Supra) came to be decided on 21.7.1999. Possibly the Division Bench of this Court might not have come across the case of State of Punjab (Supra) and therefore, both the authorities cited by Mr. Mankad are not applicable to this case. Particularly when Apex Court has specifically held that the provisions of Section 50 of the Act implicitly make it imperative and obligatory and cast a duty on the investigating officer (empowered officer) to ensure that search of the person (suspect) concerned is conducted in the manner prescribed by Section 50, by intimating to the person concerned about the existence of his right, that if he so requires, he shall be searched before a gazetted officer or a Magistrate.

##. In a recent judgement of Hon'ble Supreme Court in case of BECKODAN ABDUL RAHIMAN VS. STATE OF KERALA, reported in (2002) 4, SCC 229, it is held that the accused was required to be apprised of his right conferred under Section 50 of the NDPS Act giving him an option to search being made in presence of Gazetted officer or the Magistrate. In that case, P.W. 1 K.R. Premchandran had asked the accused " whether I should search him in the presence of senior officers or a gazetted officer". Looking to this evidence, Hon'ble Supreme Court has held that accused is not shown to have been apprised of his right nor any option offered to him for search being conducted in the presence of Magistrate. By observing this, the Hon'ble Supreme Court held in para 6 as follows :-

"We are of the firm opinion that the provisions of sub-section (2) of Section 42 and the mandate of Section 50 were not complied with by the prosecution, which rendered the case as not established. In view of the violation of the mandatory provisions of the Act, the appellant was entitled to be acquitted. "

As observed earlier, when the Hon'ble Supreme Court has held that accused should be informed of about his right to be searched in presence of either Gazetted officer or a Magistrate, then this is a case of option being given for two authorities. Accused were given a right of being searched in presence of himself or some superior officer, then it cannot be said that option was given to him. Option can be given for more than one authority. We are of the view that when duty is cast on the concerned officer to inform both the accused for their right of being searched in presence of either Gazetted officer or a Magistrate, the then concerned officer ought to have given two options, so that accused could exercise their option, out of two.

##. Under the circumstances, in present case provisions of Section 50 are not complied with, before searching the "person" of each accused. When Section 50 of the NDPS Act is mandatory, its provisions, are required to be scrupulously followed by the empowered officer and when said provisions are not complied with, then, it vitiate the conviction and sentence of the accused. On this ground only, the judgement of conviction and sentence is required to be quashed and set aside.

##. Shri D.M. Shah, learned advocate for the appellants has argued that the prosecution has examined only one panch witness Umesh Roopchand Bhatiya at Ex.10. This witness was declared to be a hostile witness to the prosecution. He has not supported the case of the prosecution. Inspite of the fact that one of the two panch witnesses was declared as hostile witness, prosecution has not examined another panch witness namely Balkrishna Ramjidas. The request for dropping this witness i.e. Balkrishna is not stated in the closing purshis Ex.27. No reason is stated by prosecution to drop that another panch witness.

##. Shri D.M. Shah has argued that it is the case of the prosecution, as reflected in the complaint Ex.13 that on making search of house of accused No. 1, one small scale and weight measure of 50 grams were found from the

top of cup-board. It is also stated in the complaint that scale and other weight measures were called for and thereafter, contraband articles which were recovered from the accused, were weighed. As per the case of the prosecution, such scale and weight measures were called from one Arvindbhai Muljibhai, who is examined as PW -4 at Ex.23. This witness has not supported the case of the prosecution. He was declared to be a hostile witness. PW - 5 Shri R.B. Chaudhari has deposed in para 5 of his evidence that it was true that they had called for a scale through witness and at that time, they (police) had searched a weight measure of 50 grams. He has further deposed that Arvindbhai had with him two weight measures one of 20 grams and other of 25 grams. Shri Shah has argued that it is the case of the prosecution that after making a recovery of articles from the 'person' of each accused, that articles were weighed. It may be noted that 28 small balls of "Charas" were found from accused No. 2 Ramanbhai Becharbhai. They were weighed and it was found that total weight of 28 balls was 14 grams. Shri Shah has argued that it is impossible to weigh with the help of weight measures of 20 grams, 25 grams and 50 grams and to come to the conclusion that weight of 28 small balls of 'Charas' found to be 14 grams and therefore, the case of the prosecution as it is submitted before the Trial Court, is not probable, believable and acceptable.

##. Shri D.M. Shah, learned advocate for the appellants has argued that in this case, prosecution has not examined respective police officers to complete the chain to satisfy the Court as to how, when and in what manner the muddamal articles travelled right from custody of the complainant to FSL. Shri Jadeja has deposed that he lodged the complaint against the accused. he has not deposed as to how he dealt with the muddamal articles, which he had seized from the accused. P.W.-3 Udesinh Vajesinh, who accompanied Shri Chaurdhari has also not deposed anything about the journey of Muddamal articles. Shri Chaudhari who is an Investigating Officer has deposed that after search was completed, both the accused were arrested and thereafter PSI Jadeja lodged the complaint Ex. 13. He has not deposed as to what happened to muddamal articles. He has deposed specifically in his evidence that it was true that he knows nothing as to to whom muddamal articles were handed over. Raid was carried out on 23rd June, 1996. Responsible officer for and on behalf of Assistant Director, FSL received muddamal articles on 4th July, 1996. There is no evidence as to in what manner and in whose custody that muddamal articles remained and

therefore, this unexplained position with regard to journey of muddamal articles creates serious doubt. Possibility of tempering with the muddamal articles during the period of 11 days cannot be ruled out in this case. Section 55 of the Act casts a duty on the officer conducting a search and seizure to deposit seized and sealed article immediately after the seizure to the officer-in-charge or the nearest police station and the police officer of the police station shall take charge of the seized articles and keep it in the safe custody pending the orders of the Magistrate. Non compliance of Section 55 of the Act creates a doubt of which benefit be given to accused.

##. From very beginning it is the case of the prosecution that on search of person of accused No. 2 being made, 28 small balls of Charas wrapped in white paper were found from the pocket of trouser worn by accused No. 2. Shri D.M. Shah has argued that charge framed against accused No. 2 is cryptic one. If we read charge Ex.3, we found that a specific case has been put against accused No. 1 that opium was found from his possession. So far as case against accused No. 2 is concerned, no specific case has been put against accused No. 2, that he was found with possession of Charas. On reading charge Ex.3, we found that the learned Judge has referred to the names of only two substances in his charge Ex. 3. For accused No. 1 a reference is made that he was found with possession of opium. No separate reference is made for accused No. 2 and also with regard to substance found from his possession. In para 3 of the charge, a joint reference is there for both the accused with regard to small packets of opium. In para 4, there is a joint reference is there for both the accused for possessing a Ganja. Thus, a charge is not framed against accused No. 2 for article found from his possession as alleged by the prosecution. As per the case of the prosecution, 28 small balls of 'Charas' wrapped in white paper were found from the pocket of trouser of accused No. 2. No charge is framed against accused No. 2 for having possession of Charas. Thus, accused No. 2 is seriously prejudiced to meet with the case for which, evidence is led by the prosecution. In view of this, accused No. 2 cannot be convicted for having possession of 28 small balls of Charas found from the his possession.

##. It may be noted that looking to charge Ex.3, each accused is charged for offences punishable under Sections 17,18, 20 (b), 21 and 27 of the NDPS Act. As stated earlier, accused No. 1 is convicted and sentenced for an

offence punishable under Sections 17, 18, 20 (b)) and 27 of the NDPS Act. Meaning thereby, accused No. 1 is acquitted of an offence punishable under Section 21 of the NDPS Act. The State Government has not preferred any appeal against acquittal of accused No. 1 for an offence punishable under Section 21 of the NDPS Act.

Accused No. 2 is convicted for an offence punishable under Section 21 of the NDPS Act only. Section 21 of the NDPS Act read as under :

"Section 21 :-Punishment for contravention in relation to manufactured drugs and preparations:-

Whoever, in contravention of any provision of this Act, or any rule or order made or condition of licence granted thereunder manufactures, processes, sells, purchases, transports, imports inter-State exports inter state or uses any manufactured drug or any preparation containing any manufactured drug shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees."

Looking to text of Section 21, a person can be convicted for an offence punishable under Section 21 of the NDPS Act, if he is found dealing with either by way of manufacturing, possessing, selling, purchasing, transporting, importing (inter-state), exporting (inter state) or using any manufactured drug or any preparation containing any manufactured drug. It is not the case of the prosecution that accused No. 1 was found in possession of any manufactured drug or any preparation containing any manufactured drug. The word "Manufactured Drug" is define in clause -XI of Section 2 of the NDPS Act. It reads as follows :-

"(xi) "manufactured drug" means :-

(a) all coca derivatives, medicinal cannabis, opium derivatives and poppy straw concentrate;

(b) any other narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare to be a manufactured drug,

but does not include any narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare not to be a manufactured drug.

##. Looking to definition of manufactured drug, case against accused No. 2 does not fall under section 21 of the NDPS Act, because, case against accused No. 2 is altogether a different one. Case against accused No. 2 is to the effect that he was found with 28 small balls of Charas. As per clause III of Section 2, "Charas" is one of the product of "cannabis (hemp)". Looking to case of prosecution against accused No.2 as reflected in complaint, at the best, case against accused No. 2 may fall under Section 20 (b) of the Act. Section 20 (b) is for contravention of Section 8 of the Act in relation to cultivation of any cannabis plant. Though the charge was framed against accused No. 2 for an offence punishable under Section 20 (b) of the Act, accused No. 2 is not convicted for that offence. He is convicted for an offence punishable under Section 21 of the NDPS Act, for which, there is no case at all against him. Therefore, conviction of accused No. 2 is manifestly illegal and unwarranted and in no case, it can be said that judgement of conviction and sentence against accused No. 2 is correct and legal one. For a moment, if it is believed that case against accused No. 2 is proved for the offence punishable under Section 20 (b) of the Act then, in the conviction appeal, this court cannot alter the conviction because, there is no acquittal appeal from Government side for acquittal of accused No. 2 for an offence punishable under Section 20 (b) of the Act.

##. In view of what is discussed hereinabove, in this case, there is a clear cut violation of Sections 41, 42, 50 and 55 of the NDPS Act. Once, it is found that Section 50 is not complied with, conviction cannot be sustained. We have also discussed the fact with regard to absence of evidence to prove the journey of muddamal articles right from point of time when that muddamal articles were recovered and seized from the accused, till that muddamal articles were received by responsible officer in the office of the FSL. As observed earlier, muddamal articles were seized from respective accused on 23.6.1996 and same were received by the responsible officer of the FSL on 4.7.1996 vide Ex.25. From letter Ex.25, it is clear that muddamal articles were sent by police authority under covering letter dated 3.7.1996.

Thus, muddamal articles remained in custody of police during the period from 23.6.1996 to 3.7.1996. This period cannot be said to be a short period. Prosecution has not examined witnesses who dealt with muddamal articles during custody of the muddamal with them. PW-5 Shri Chaudhari, who carried out raid has not deposed anything on the point as to to whom that Muddamal articles were handed over, after that articles were seized under panchnama. Normally, muddamal articles alongwith accused are being handed over to the P.S.O. of Police Station when complainant lodged his complaint in the police station. PW-2 complainant - Mr. Jadeja has deposed in para 5 of his deposition that he lodged the compliant Ex. 13 against accused. He has not deposed anything on the point as to to whom he handed over the muddamal articles seized from the accused. PW-5 Shri Chaudhari has deposed that he had sent muddamal articles under covering letter Ex.25. He has not stated as to with whom he sent that muddamal articles to FSL. Thus, there is an absence of complete chain with regard to journey of muddamal articles right from seizure of that articles to receipt of that articles by responsible officer in the office of the FSL. Thus, this is a case in which, on reappreciation of evidence, we come to a conclusion that conviction of both the accused is wrong and judgement of conviction and sentence cannot be allowed to sustain any more, in view of the evidence discussed hereinabove.

##. In the result, these two appeals deserve to be allowed. Conviction and sentence of both the accused vide judgement Ex.28 dated 11th September, 1997 rendered by Additional Sessions Judge, Nadiad in Special NDPS Case No. 9 of 1996, is quashed and set aside. Accused be set free forthwith, provided they are not required any more in judicial custody for any other case.

(D.K. Trivedi, J.)

(H.H. Mehta, J.)

pallav